IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
Joel P. Hoekstra, Presiding Judge

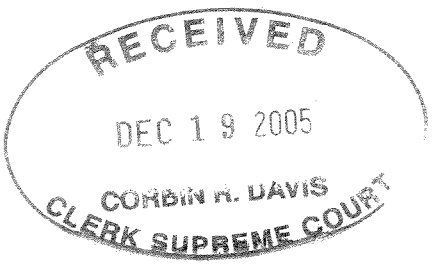
MARCIA VAN TIL
Plaintiff-Appellant,

v

Docket no. 128283

ENVIRONMENTAL RESOURCES MANAGEMENT, INC
Defendant-Appellee.
_____/

BRIEF ON APPEAL - AMICUS CURIAE COMPENSATION LAW SECTION



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STATEMENT OF THE BASIS FOR THE JURISDICTION OF THE COURT

The Court has jurisdiction to review the opinion that was entered by the Court of Appeals in *Van Til v Environmental Resources Mgt, Inc*, unpublished opinion of the Court of Appeals, decided on February 10, 2005 (Docket no. 250539) by the authority of Michigan Court Rule 7.301(A)(2).

STATEMENT OF QUESTION PRESENTED

I

SHOULD ONLY A JUDGMENT THAT IS ALREADY FINAL BE PRESERVED WHEN OVERRULING THE DECISION IN THE CASE OF *SEWELL v CLEARING MACHINE CO*, 419 MICH 56; 347 NW2d 447 (1984)?

Plaintiff-appellant Van Til may answer "Yes."

Defendant-appellee Environmental may answer "No."

Amicus curiae Workers' Comp Law Section answers "Yes."

Court of Appeals did not answer.

Trial court did not answer.

STATEMENT OF FACTS

Byron Van Til was an employee of Environmental Resources Management, Incorporated, who asked that Marcia Van Til help with waxing some floors and suggested doubling his paycheck to avoid the inconvenience of two separate payments for the job. Steve Koster, his supervisor, agreed.

Marcia was burned by the wax remover applied by Byron and sued Environmental for not warning of the danger. Environmental answered that it was immune from the lawsuit because Marcia was an employee whose only recourse was workers' disability compensation because of the first and second sentences of MCL 418.131(1).[1] Marcia replied that she was only a volunteer.

Initially, the trial court allowed the lawsuit upon deciding that Marcia was not an employee because the evidence — the testimony of Marcia and Byron Van Til and Steve Koster — established that there had been no contract of hire with Environmental as required by the first sentence of MCL 418.161(1)(l).[2] However, on reconsideration, the trial court dismissed the suit with its decision that Environmental was responsible for

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[1] "The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort."

[2] "As used in this act, 'employee' means:

* * *

Every person in the service of another, under any contract of hire, express or implied, including aliens; a person regularly employed on a full-time basis by his or her spouse having specified hours of employment at a specified rate of pay; working members of partnerships receiving wages from the partnership irrespective of profits; a person insured for whom and to the extent premiums are paid based on wages, earnings or profits; and minors, who shall be considered the same as and have the same power to contract as adult employees."

compensation because of the first sentence of MCL 418.171(3),[3] which applied because Steve had allowed Byron to hire Marcia to help with the job. The trial court did not account for the requirement of the second sentence of MCL 418.171(2).[4] *Van Til v Environmental Resources Mgt, Inc*, unpublished opinion of the Court of Appeals, decided on February 10, 2005 (Docket no. 250539) 1-2, 4.

The Court of Appeals affirmed with *its* decision that Marcia was an employee of Environmental. *Van Til, supra*, 4.

The Court granted leave to appeal and directed briefing the question "whether the trial court had jurisdiction to determine whether plaintiff was an employee, or whether that question must first be resolved in the workers' compensation adjudicatory system. See *Reed v Yackell*, 473 Mich 520, 542 (2005) [CORRIGAN, J., dissenting]." The Workers' Compensation Law Section of the State Bar of Michigan was invited to file a brief amicus curiae. *Van Til v Environmental Resources Mgt, Inc*, 474 Mich 913 (2005).

This brief amicus curiae enlarges upon the argument that the Compensation Law Section presented in the *Brief on Appeal - Amicus Curiae Compensation Section of State Bar* in *Reed, supra*.

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[3] "If any employer subject to the provisions of this act, in this section referred to as the principal, contracts with any other person, in this section referred to as the contractor, who is not subject to this act or who has not complied with the provisions of section 611, and who does not become subject to this act or comply with the provisions of section 611 prior to the date of the injury or death for which claim is made for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any person employed in the execution of the work any compensation under this act which he or she would have been liable to pay if that person had been immediately employed by the principal."

[4] "The employee shall not be entitled to recover at common law against the contractor for any damages arising from such injury **if** he or she takes compensation from such principal." (emphasis supplied)

SUMMARY OF ARGUMENT

Reliance and consequences can be important only after the decision in the case of *Sewell v Clearing Machine Co*, 419 Mich 56; 347 NW2d 447 (1984), reh den 419 Mich 1213 (1984) is overruled.

ARGUMENT

I

ONLY A JUDGMENT THAT IS ALREADY FINAL SHOULD BE PRESERVED WHEN OVERRULING THE DECISION IN THE CASE OF *SEWELL v CLEARING MACHINE CO*, 419 MICH 56; 347 NW2d 447 (1984).

Usually, a decision by the Court about the meaning of a statute applies to any case that is subject to the statute as the Court has said that, "the general rule is that judicial decisions are to be given complete retroactive effect." *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (2005). However, some cases are excluded and others are exempted from this general rule.

Two kinds of cases are excluded from the general rule. A case that has already been decided is excluded for two reasons. First, a case that has already been decided is not a *pending* case. And second, a case that has already been decided is subject to only the order or judgment that the trial court entered because of the rule of res judicata as Justice COOLEY said for the Court in the case of *Jacobson v Miller*, 41 Mich 90, 93; 1 NW 1013 (1879),

> "legal controversies are not to be suffered to be tried over and over, to the annoyance of parties, the disturbance of the community, the unnecessary absorption of the time of the court, and at an expense not less to the public than to the litigants.
>
> The general principles which must govern the case are familiar. There are two matters in respect to which an adjudication once made may be conclusive: *first*, the subject matter involved in the litigation; *second*, the point of fact or of law, or of both, which was necessarily adjudicated in determining the issue upon the subject matter in litigation."

Another kind of case excluded from the operation of a decision by the Court is one that is pending a decision by a trial court on remand. While a *pending case*, a trial court must obey the mandate of the court as the law of the case. *Tebo v Havlik*, 418 Mich 350, 379-380, 379-380, n 17; 343 NW2d 181 (1984) (LEVIN, J., dissenting), reh den 419 Mich 1201 (1984). A later decision by the Court which might contradict the mandate can be applied during the appeal that is available after the trial court has fulfilled the mandate. *Tebo, supra*, 380, n 18.

Unlike an exclusion which is mandatory, exceptions to the general rule are ad hoc. The United States Constitution does not require any particular application of a decision by the Court about the meaning of a statute as the United States Supreme Court recognized in the case of *Great Northern R Co v Sunburst Oil & Refining Co*, 287 US 358, 364; 53 S Ct 145; 77 L Ed 360 (1932),

> "We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed there are cases, intimating, too broadly * * *, that it *must* give them that effect; but never has doubt been expressed that it *may* so treat them if it pleases, whenever injustice or hardship will thereby be averted." (emphasis by the Court)

The Michigan Constitution also does not direct any specific application of a decision by the Court as the Court observed in the case of *People v Hampton*, 384 Mich 669, 674; 287 NW2d 404 (1971), "this Court is under no constitutional compulsion to apply the *Cole* rule, either prospectively or retroactively." While statutes — MCL 8.3a[5] and

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[5] "All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."

MCL 750.2[6] — establish *how* the Court should understand statutes, there is no statute which establishes *when* a decision applies. There is no rule or administrative order of the Court describing an exception of a case from a decision about the meaning of a statute.

Ad hoc does not mean that there is no standard for excepting a case from a decision by the Court. Indeed, there are very well established rules for this. The first concerns the occasion for any exception. The occasion for an exception is a decision by the Court that announces a new rule, which includes a decision that overrules clear and established case law. Justice LEVIN recapitulated this rule from the decisions by the United States Supreme Court and the Court by stating that "a decision of this Court is generally retroactive unless it overrules established precedent or otherwise declares a new rule, in which case the Court may limit the retroactivity of the new rule." *Tebo, supra*, 381. Most recently, the Court said in the case of *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 587; 702 NW2d 539 (2005), that, "As we reaffirmed recently in [*Wayne Co v*] *Hathcock* [471 Mich 445, 484, n 98; 684 NW2d 765 (2004)], prospective-only applications of our decisions is generally 'limited to decisions which overrule *clear and uncontradicted* case law.'" (emphasis by the Court) Overruling a decision by the Court of Appeals is not an occasion for an exception no matter how clear and uncontradicted it might be. *Tebo, supra*, 380-381, "a subsequent decision by this Court disapproving or overruling a Court of Appeals decision does not constitute a 'declaration of a new rule' or 'overruling of established precedent' . . ."

After this predicate — a decision by the Court overruling established precedent or announcing some brand new law — a second standard applies. This establishes the particular criteria to consider for actually excepting a case. In the case of *People v Auer*, 393 Mich 667, 676-677; 227 NW2d 528 (1975), the Court held that,

> "The test for determining whether a rule is to be applied retrospectively or prospectively is set forth in *People v*

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[6] "All provisions of this act [Penal Code] shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law."

Hampton, 384 Mich 669, 674; 187 NW2d 404 (1971), as follows:

> 'The United States Supreme Court has discussed various factors to be used in determining whether a law should be applied retroactively or prospectively. There are three key factors which the Court has taken into account: (1) the purpose of the new rule; (2) the general reliance on the old rule; and (3) the effect on the administration of justice. See, *e.g.*, *Linkletter v Walker* (1965), 381 US 618 (85 S Ct 1731, 14 L Ed 2d 601); *Tehan v United States ex rel Shott* (1966), 382 US 406 (86 S Ct 459, 15 L Ed 2d 453).'"

The three criteria — purpose of the new rule/reliance/effect on administration of justice — all inform the idea of exigent circumstances, which was expressed by the Court in the case of *Devillers*, *supra*, 586, that, "Prospective application is a departure from this usual rule and is appropriate only in 'exigent circumstances.'"

In the case of *People v Markham*, 397 Mich 530, 535; 245 NW2d 41 (1976), the Court explained how each of these criteria could be considered,

> "Those cases establish a three-pronged test, namely, '(1) the purpose of the new rule; (2) the general reliance on the old rule; and (3) the effect on the administration of justice'. 384 Mich at 674.
>
> The first factor promotes an inquiry into whether the purposes of the rule can be effectuated by prospective application. When the ascertainment of guilt or innocence is not at stake, prospective application is possible. 384 Mich at 677. *White* and the guarantee against double jeopardy are not required to ascertain guilt or innocence.
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> 'The second and third factors can be dealt with together because the amount of past reliance will often have a profound effect upon the administration of justice.' *Id.*
>
> When a decision overrules past settled law, more reliance is likely to have been placed in the old rule than in cases where the old law was unsettled or unknown."

And Justice LEVIN added that the preservation of an issue was also part and parcel of the inquiry about reliance by stating in *Markham*, *supra*, 542-543 (LEVIN, J., dissenting),

> "The question whether an accused person waives the benefit of a new decision by failing to raise the issue in the trial court before the new decision is announced poses, in somewhat different form, the question of the retroactivity of that decision.
>
> The consequence of failure to preserve the issue is determined by the extent of the retroactivity. If a decision is fully retroactive, failure to raise the issue in the trial court or pursue it on direct appeal is of no consequence and will not preclude collateral attack on the conviction. If the retroactivity of the decision is limited to (1) cases pending on direct appeal; (2) cases pending on direct appeal where the issue was raised on appeal; or (3) such cases where the issue was preserved in the trial court, failure to preserve the issue at the trial or appellate level is of consequence."

The most important feature of this protocol is that the purpose/reliance/effect on administration or exigency is considered only AFTER the Court has actually overruled a decision about the meaning of a statute and AFTER the Court recognizes that the decision which has been overruled was *clear and uncontradicted.* And this means that the purpose/reliance/effect on administration or exigency cannot be considered when deciding to overrule an opinion of the Court.

This is consistent with the established process of reviewing an opinion of the Court about the meaning of a statute. The only measure of a decision by the Court is the fidelity to the text. The Court has said this repeatedly and no more forcefully than in the case of *Mayor of the City of Lansing v Pub Service Comm*, 470 Mich 154, 161, 164; 680 NW2d 840 (2004),

> "Our task, under the Constitution, is the important, but yet limited, duty to read and interpret what the Legislature has actually made the law. We have observed many times in the past that our Legislature is free to make policy choices that, especially in controversial matters, some observers will inevitably think unwise.
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> * * *
>
> . . . rather than engaging in legislative mind-reading to discern the 'true intent' of the law, we believe that the best measure of the Legislature's intent is simply the words that it has chosen to enact into law. Among other salutary consequences, this approach to reading the law allows a court to assess not merely

> the intentions of one or two highlighted members of the Legislature, but the intentions of the *entire* Legislature." (emphasis by the Court)

Whether a decision is actually faithful to the text of a statute is informed by an independent or de novo reading of the statute by the Court; a consideration of the case law that was previously relied upon; and the reasoning used. The Court has invariably engaged this process when considering and overruling decisions about the meaning of statutes in the Workers' Disability Compensation Act of 1969, MCL 418.101, et seq. *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002). *Rakestraw v Gen Dynamics Land Sys, Inc*, 469 Mich 220; 666 NW2d 199 (2003). *Bailey v Oakwood Hosp & Med Ctr*, 472 Mich 685; 698 NW2d 374 (2005). In the case of *Sington, supra*, the Court considered the validity of the decision in the case of *Haske v Transport Leasing, Inc*, 455 Mich 628; 566 NW2d 896 (1997), reh den 456 Mich 1202; 570 NW2d 653 (1997) and overruled it for the lack of fidelity to the text of the first and second sentences of MCL 418.301(4). This lack of fidelity was established by first considering the statute itself;[7] then, assaying the existing

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[7] "We begin our analysis with the definition of 'disability' in the WDCA:

> As used in this chapter, 'disability' means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss. [MCL 418.301(4).]

As this language plainly expresses, a 'disability' is, in relevant part, a limitation in 'wage earning capacity' in work suitable to an employee's qualifications and training. The pertinent definition of 'capacity' in a common dictionary is 'maximum output or producing ability.' *Webster's New World Dictionary* (3d College ed). Accordingly, the plain language of MCL 418.301(4) indicates that a person suffers a disability if an injury covered under the WDCA results in a reduction of that person's maximum reasonable wage earning ability in work suitable to that person's qualifications and training." *Sington, supra*, 155.

case law;[8] and finally, analyzing the reasoning that was used to decide *Haske, supra*.[9]

This same process was used in *Rakestraw, supra*, in which the Court considered the accuracy of a group of decisions by the Court of Appeals that culminated in the case of *Mattison v Pontiac Osteopathic Hosp*, 242 Mich App 664; 620 NW2d 313 (2000). First, the Court considered the text of the first sentence of MCL 418.301(1), which was the statute in the WDCA that applied;[10] then, considered the case

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[8] "Our analysis in this regard is consistent with the following conclusion of this Court in *Rea v Regency Olds/Mazda/Volvo*, 450 Mich 1201; 536 NW2d 542 (1995)" *Sington, supra*, 156.

[9] "This conclusion stands in contrast to the one the *Haske* majority reached. In *Haske, supra* at 634, this Court concluded that § 301(4) defined disability as 'a personal injury or work-related disease that prevents an employee from performing any work, even a single job, within his qualifications and training . . . .' Because of the words the Legislature used in § 301(4), the *Haske* definition of disability is untenable.

* * *

. . . the *Haske* majority was concerned that reading the first sentence in accordance with its plain meaning would render the second sentence nugatory.

However, we do not believe that this concern was justified." *Sington, supra*, 158, 160.

[10] "MCL 418.301(1) states in pertinent part:

> An employee, who receives a *personal injury arising out of and in the course of employment* by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act. . . . [Emphasis added.]

Under the clear and unambiguous language of the statute, an employee must establish that he has suffered 'a personal injury arising out of and in the course of employment' in order to be eligible." *Rakestraw, supra*, 225.

law;[11] and finally, analyzed the reasoning by the Court of Appeals and found it unfaithful to the statute and those decisions overruled.[12]

The Court again did this in the case of *Bailey, supra*. First, the text of the statute was considered;[13] then, the Court considered the existing case law — all from the Court of Appeals — and finally, weighed the reasoning that was used and found it unsound and overruled those decisions.[14]

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11 ". . . several cases from this Court have articulated the principle that, where an employee claims to have suffered an injury whose symptoms are consistent with a preexisting condition, the claimant must establish the existence of a work-related injury that extends 'beyond the manifestation of symptoms' of the underlying preexisting condition. *Id.* at 216." *Rakestraw, supra*, 228.

12 "Holding that the aggravation of symptoms of a preexisting condition is compensable without finding a work-related injury under § 301(1) is clearly inconsistent with the clear language of the statute as well as case law from this Court. The statute requires proof that an employee suffered a personal injury 'arising out of and in the course of employment' in order to establish entitlement to benefits. To the degree that the Court of Appeals decisions [citations omitted] hold otherwise, they are overruled." *Rakestraw, supra*, 225, 228, 230.

13 "When ascertaining intent, we read differing statutory provisions to produce an harmonious whole. MCL 8.3a; *Farrington v Total Petroleum, Inc*, 442 Mich 201, 208-209, 212; 501 NW2d 76 (1993).

THE STATUTORY LANGUAGE

The following are the relevant statutory provisions: [quotation omitted]

* * *

The notification provisions, § 925(1), reads: [quotation omitted]"

14 "The flaws in *Robinson* and *Valencic* become painfully apparent when their holdings are applied to this case. The Legislature enacted the Worker's Disability Compensation Act to provide a reliable source of benefits to employees injured on

. . . continued on page 11

In none of these cases or, indeed, *any* case, was the decision about the validity of an opinion effected by the subsequent reliance or the effects on the administration of justice. And for good reason. First, it is the duty of the Court to reexamine a precedent when its reasoning is questioned as the Court has said and said again that, "it is 'our duty to re-examine a precedent where its reasoning . . . is fairly called into question.'" *Sington, supra*, 161.

Second, reliance and the consequences to the administration of justice or even society at-large cannot properly inform whether a decision was faithful to the text of a statute. Both can only inform the relative wisdom or expediency of the ruling, which can never account for the law as the Court said in *Mayor of the City of Lansing, supra*, 163-164,

> "(1) The justices in this majority do not necessarily disagree with the dissent that MCL 247.183, as we construe it here, may be 'cumbersome.' *Post* at 185. Nor, by this opinion, does any justice in this majority suggest that, had they been in the Legislature, they would have cast a vote in support of MCL 247.183 as it is interpreted here. Nor are the justices in this majority oblivious to the practical difficulties that our interpretation of the law may impose upon utilities such as Wolverine Pipe Line Company. Rather, what we decide today is merely that the language of MCL 247.183 compels a particular result, and the justices of this majority do not believe themselves empowered to reach a different result by substituting their own policy preferences for those of the Legislature.
>
> * * *
>
> . . . dispute over the wisdom of a law, however, cannot give warrant to a court to overrule the people's Legislature."

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continued from page 10 . . .

the job regardless of tort liability. *McAvoy v H B Sherman Co*, 401 Mich 419, 437; 258 NW2d 414 (1977).

In applying *Robinson, Valencic,* and MCL 418.925(1) to this case, the Court of Appeals and the WCAC were trapped in a Catch-22. They had to release the employer-carrier and the fund from liability, leaving no one to pay plaintiff's benefits. This directly contradicted the express language of MCL 418.921 . . ." *Bailey, supra*, 693, 695.

Reliance and the consequences of a decision by the Court cannot be a part of measuring the accuracy of the opinion for both are non-textual modes of understanding. Reliance on a decision by the Court about the meaning of a statute is only another way of expressing the acquiescence to the decision, which is an extra-textual mode that cannot be used to establish the meaning of a statute. *People v Hawkins*, 468 Mich 488, 507; 668 NW2d 602 (2003). And the effect on the administration of justice or society is merely another way of describing the actual text of a statute as cumbersome, impractical, or unwise, which are all extra-textual. *Mayor of the City of Lansing, supra*, 161.

Third, reliance and the consequences to the administration of justice are the factors which animate the rule of stare decisis, which does not apply to the Court. Jurisprudentially, the rule of stare decisis concerns judicial action, not thought. Stare decisis requires both the recognition and absolute obedience by the Court of Appeals and every trial court to every ruling of law in any opinion of the Court. While obedient, the Court of Appeals and a trial court remain quite free to express what is thought about the accuracy of the opinion by the Court. *Tebo, supra*, 362-363, 363, n 2 (BRICKLEY, J., lead opinion). *Tebo, supra*, 379 (LEVIN, J., dissenting). *In re the Matter of Hague*, 412 Mich 532, 545; 315 NW2d 524 (1982). The Court of Appeals and trial courts fully appreciate that stare decisis commands judicial action but not thought. The Court of Appeals appreciated this in stating in the case of *Edwards v Clinton Valley Center*, 138 Mich App 312, 314; 360 NW2d 606 (1984),

> "As a member of the Court of Appeals, I am obligated to follow the decisions of our higher court. For that reason, and that reason alone, the order of summary judgment is affirmed.
>
> I feel compelled, however, to register my fundamental disagreement with the result adopted by the *Perry* majority."

The rule of stare decisis allows for no exception.

As a rule of compulsion, stare decisis cannot apply to the Court. No decision by the Court can forever command strict obedience by the Court. And the Court has never

actually thought so. In the case of *Sington, supra,* 161, the Court said that, "stare decisis is 'not to be applied mechanically to forever prevent the Court from earlier erroneous decisions determining the meaning of statutes.' *Robinson, supra,* 463."

Because stare decisis cannot apply "mechanically," it cannot apply to the Court at all for it is jurisprudentially a mechanical rule. Certainly, the Court has said that stare decisis is a "policy" for it to follow. The Court said in the case of *Robinson v City of Detroit,* 462 Mich 439, 464; 613 NW2d 307 (2000) that, "stare decisis is a 'principle of policy' rather than 'an inexorable command' and that the Court is not constrained to follow precedent . . ." This is quite problematic. There is no jurisprudentially sound way to explain how the rule *is* an inexorable command for the Court of Appeals and trial courts but only a "policy" for the Court itself. It is peculiar that the rule of stare decisis could allow the Court of Appeals and all of the trial courts the full freedom of thought and the unrestrained expression of opinion about a decision by the Court but then somehow prefer that the Court itself not think about its prior opinions. And it is difficult to see how "the actual and perceived integrity of the judicial process" is *promoted* when stare decisis inhibits review and correction of an erroneous decision. No rule can promote the integrity of the judiciary by perpetuating a ruling which was not faithful to the text of a statute. The integrity of the judiciary as part of a regime of law and not people *is* promoted by a full and uninhibited consideration of prior rulings for the fidelity to text.

Finally, reliance and the consequences to the administration of justice which are said to support the rule of stare decisis for the Court are recognized and applied in deciding to except cases from a new decision.

Politically, the rule of stare decisis is antithetical to the function of the Court. The signal function of the Court is to say what the law is. The function of the Court is not to say what that ought to be much less contradict the law. This principle antedates any decision about stare decisis.

The principle emerged during the Senate trial on the impeachment of United States Supreme Court Justice Samuel Chase in 1804. When the lawyers for Justice Chase sought to defend his actions as a circuit court judge that disallowed legal arguments because the law could be and had been settled, the House managers asserted that an argument about the meaning of the law could never be closed off from further judicial investigation. The value of a written constitution and written statutes and written opinions was in the ability to be read. A line of opinions might well be clear but constitutional and statutory meaning were not equivalents and a court could always hear reargument and the criticism of its precedents. While Justice Chase was not convicted, the point was made and was fully appreciated by the judiciary by the exceedingly close vote. Whittington, *Constitutional Construction, Divided Powers and Constitutional Meaning*, 52-54 (Harvard Univ Press 1999).

Ultimately, the standard for overruling a decision is only the fidelity to the statute while the standard for *applying* a new opinion allows recognizing and ameliorating the effects of a change.

The Court can and, indeed, must reexamine the decision in the case of *Sewell v Clearing Machine Co*, 419 Mich 56; 347 NW2d 447 (1984) for fidelity to the text of the first sentence of MCL 418.841(1) from the text; from the prior case law; and from the reasoning that was used then and without regard to later reliance or the effects on the administration of justice by the decision. *Sewell, supra*, fails by these measures and so, must be overruled.

In the case of *Sewell, supra*, 62, the Court decided that a trial court had jurisdiction to decide whether a person was an **employee** of another as the term is described by the WDCA. The jurisdiction was shared or concurrent with the Workers' Compensation Agency. The Court announced that,

> ". . . the bureau has exclusive jurisdiction to decide whether injuries suffered by an employee were in the course of

> employment. The courts, however, retain the power to decide the more fundamental issue whether the plaintiff is an employee (or fellow employee) of the defendant."

This was not faithful to the text of the first sentence of section 841(1), which describes the jurisdiction of the Agency — including the Board of Magistrates — by stating that, "Any dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate, as applicable."

Any in **Any dispute** and **all** in **all questions arising under this act** are predeterminers which refer to the whole quantity of a particular group. **All** and **any** negative a limitation or exclusion from the group. *The Oxford American College Dictionary* (Oxford University Press 2002). The Court said in the case of *Gibson v Agricultural Life Ins Co of America*, 282 Mich 282, 289; 276 NW 450 (1937) that "the word 'any,' which, to the ordinary understanding implies 'of every kind.' The word negatives the idea of exclusion . . ." And in the case of *Jesionowski v Allied Products Corp*, 329 Mich 209, 212; 45 NW2d 39 (1950), the Court said of **all** in **all questions arising under this act** that, "it seems clear that the legislature has vested plenary power in the compensation commission [which is now a magistrate], as a quasi-judicial agency, to determine all essential factual issues."

The Court and the Court of Appeals uniformly ruled that **Any dispute** and **all questions arising under this act** was indeed a grant of ex*clusive* subject matter jurisdiction to the Agency before the decision of *Sewell, supra*. *Munson v Christie*, 270 Mich 94; 258 NW2d 415 (1935). *Jesionowski, supra*. *Morris v Ford Motor Co*, 320 Mich 372; 31 NW2d 89 (1948). *Dershowitz v Ford Motor Co*, 327 Mich 386; 42 NW2d 900 (1950). *Szydlowski v Gen Motors Corp*, 397 Mich 356; 245 NW2d 26 (1976). *Aetna Life Ins Co v Roose*, 413 Mich 85; 318 NW2d 468 (1982). *Herman v Theis*, 10 Mich App 684; 160 NW2d 365 (1968). *Bednarski v Gen Motors Corp*, 88 Mich App 482; 276 NW2d 624 (1979). *Dixon*

v Sype, 92 Mich App 144; 284 NW2d 514 (1979). *Buschbacher v Great Lakes Steel Corp*, 114 Mich App 833; 319 NW2d 691 (1982). *Johnson v Arby's, Inc*, 116 Mich App 425; 323 NW2d 427 (1982). *Houghtaling v Chapman*, 119 Mich App 828; 327 NW2d 375 (1982).

The Court held in the case of *Munson, supra*, 100, that,

> "The [WDCA] contains its own procedural provisions. Under these provisions only two classes of persons may (except in cases of minors or incompetents) institute proceedings against the employer before the commission: (1) the injured employee, and (2) his dependents in the event of his death resulting from the injury. By reasonable inference, and we may say almost necessary inference, it follows that each and all of the statutory benefits, if recoverable at all, are to be determined in a proceeding instituted by the injured employee or in the event of his demise by his dependents."

In the case of *Morris, supra*, 374, the Court said, again, that,

> "Plaintiff's claim for compensation alleged an injury arising out of and in the course of his employment. Under the statutes above noted exclusive jurisdiction over the issue thus presented is conferred upon the compensation commission. * * * Whether plaintiff's injury and resultant disability were compensable under the act or not, his claim therefor was within the jurisdiction of the compensation commission." (citations omitted)

In the case of *Dershowitz, supra*, 389, 390, the Court said yet again,

> "When both the employer and employee are subject to the workmen's compensation act and plaintiff's injury arises out of and in the course of his employment, the workmen's compensation commission has *exclusive* jurisdiction to the exclusion of that of the circuit court. This was true in 1929 (CL 1929, § 8410) as it is today (CL 1948, § 411.4 [Stat Ann 1949 Cumm Supp § 17.144]). See *Osborne* v. *Van Dyke*, 311 Mich 86; *Morris* v. *Ford Motor Co.*, 320 Mich 372."

and

> "it must be held that any rights accruing to plaintiff as a result of his injury came within the *exclusive* jurisdiction of the workmen's compensation commission in the first place and that the claimed agreement between the parties, not alleged to have been approved by the commission, was invalid and void." (emphasis supplied)

And in the case of *Aetna Life Ins Co, supra*, 91, the Court said that **Any dispute** and **all questions arising under this act** allowed the Agency initial jurisdiction to decide whether an agreement was or was not subject to the WDCA itself,

> "By the very act of finding the agreement to be within, or excluded from, the provisions of the act, the bureau is exercising subject matter jurisdiction, and rightly so. Section 841 grants the bureau broad authority to review '*any* controversy concerning compensation * * * *and all questions* arising under this act'. The validity of the agreement at bar is certainly a question 'arising under this act' in that it is specifically alleged to be authorized under § 821(2)." (emphasis by the Court)

The case of *Buschbacher, supra*, 837-838, 838-839, is representative of the decisions by the Court of Appeals,

> "Exclusive jurisdiction lies with the bureau even though plaintiff's complaint does not allege or rely on an employment relationship between the parties. *Bednarski, supra, Dixon v Sype*, 92 Mich App 144; 284 NW2d 514 (1979).
>
> The only exception to the bureau's exclusive jurisdiction is where it is obvious that the cause of action is not based on the employer/employee relationship. In such cases, the circuit court does have authority to reject the claimed applicability of the exclusive remedy provision.
>
> * * *
>
> The bureau has the ultimate determination as to whether defendant's alleged duties arose only as a result of the employment relationship and whether the alleged injury is compensable under the act.
>
> Accordingly, we hold that the trial court erred in deciding that the alleged injury did not arise out of and in the course of the employment relationship. That question must first be decided by the bureau. We reverse the circuit court's order and remand the matter to the circuit court. Plaintiff shall, within 20 days of the release date of this opinion, file with the Bureau of Workers' Disability Compensation an application for a hearing on the question in controversy. If such application is timely filed, the circuit court shall hold the instant action in abeyance pending the decision of the bureau. If the bureau determines that plaintiff's injuries were suffered in the course of her employment, or if plaintiff fails to apply for a bureau determination within 20 days, the circuit court shall grant accelerated judgment to Great Lakes Steel. If the bureau finds

> the injuries not to be work-related, the circuit court action may proceed. [citations omitted]"

This vast and consistent case law about the meaning of the first sentence of section 841(1) was jettisoned by the Court with the casual aside that these fifty years of rulings were only "general statements." *Sewell, supra*, 62. The case of *Szydlowski, supra*, had pointedly *rebuked* the Court of Appeals statement in *Szydlowski v Gen Motors Corp*, 59 Mich App 180, 184-185; 229 NW2d 365 (1975) that "the circuit court has concurrent jurisdiction to decide whether a given plaintiff's exclusive remedy is under the [WDCA]." The Court — again — held,

> "This [ruling by the Court of Appeals that the circuit court has concurrent subject matter jurisdiction] is a clearly erroneous conclusion. In *Solakis v Roberts*, 395 Mich 13, 20; 233 NW2d 1 (1975), we said that when 'an employee's injury is within the scope of the act, workmen's compensation benefits are the exclusive remedy against the employer. MCLA 418.131; MSA 17.237(131).' MCLA 418.841; MSA 17.237(841) provides that 'all questions arising under this act shall be determined by the bureau'." *Szydlowski, supra*, 358,

and affirmed *Herman, supra*, in *Szydlowski, supra*, 359, "*Theis* accurately states the law and reminds us that the procedures for workmen's compensation cases have been statutorily established. It reminds us against a shortcut or circumvention of those procedures." And the latest decision on the subject just two years earlier — *Aetna Life Ins Co, supra* — was not even mentioned.

The case law that the Court relied on to decide the case of *Sewell, supra*, was a dissent in one Court of Appeals case, *Nichol v Billot*, 80 Mich App 263, 272, n 1; 263 NW2d 345 (1977) (BRENNAN, J., dissenting). *Sewell, supra*, 62-63. It is more than remarkable that a dissent in a Court of Appeals decision could supercede or "trump" the more recent decision of the Court — *Aetna Life Ins Co, supra* — and the existing body of case law from the Court of Appeals afterwards — *Bednarski, supra, Dixon, supra, Buschbacher, supra*, et al.

The citation of *Nichol v Billot*, 406 Mich 284; 279 NW2d 761 (1979) by the Court in the case of *Sewell, supra*, 62, is just as problematic. The Court decided two issues in the case of *Nichol, supra*. One was the rule to decide whether a person was an *employee* within the rubric of the WDCA and the other was whether a judge or jury in a circuit court could decide the fact. *Nichol, supra*, 292-293,

> "We granted leave to consider the following two issues:
>
> (1) In a tort action where the defendant relies on the affirmative defense that the plaintiff's exclusive remedy is under the Worker's Disability Compensation Act and the basis of such affirmative defense is the co-employee status of the plaintiff and defendant, what is the proper test by which to determine whether the plaintiff and the defendant are co-employees; and
>
> (2) Whether the question of defendant's status is an issue of law for the court or an issue of fact for the jury. 402 Mich 922 (1978)."

In the case of *Nichol, supra*, there was absolutely no concern about the question of whether a circuit court even had subject matter jurisdiction to decide one way or the other. It appears that the Court simply assumed that a circuit court had subject matter jurisdiction. However, the subject matter jurisdiction of a court cannot be presumed or waived. *Bowie v Arder*, 441 Mich 23, 56; 490 NW2d 568 (1992).

The reasoning by the Court to decide *Sewell, supra*, was not sound. There was none. The Court just said "The rule is not so broad, however." *Sewell, supra*, 62.

There is an explanation for this lack of analysis. The decision by the Court in the case of *Sewell, supra*, was reached with consideration only of the application for leave to appeal and an opposing brief. *Sewell, supra*, 59-60. Neither the application for leave to appeal or the opposing brief were scholarly.

The dispatch affected the ruling of *Sewell, supra*. The Court failed to apprehend how two facts shaped the question and the authorities to apply. One fact that the Court did not apprehend was the commercial relationship between the three people who were involved in the lawsuit. While the Court reported that there was a commercial

relationship of employee-employer between Jon Sewell and Bathey Manufacturing Company and a commercial relationship of parent-subsidiary corporation between Bathey Manufacturing Company and Armco Steel Corporation, *Sewell, supra,* 66, it failed to appreciate that a direct commercial relationship of employee-employer between Jon Sewell and Armco Steel Corporation was not needed and that the Magistrate had the authority to establish that was a direct and an indirect commercial relationship that could demonstrate an employee-employer relationship. *Allen v Kendall Hardware Mill Supply Co,* 305 Mich 163; 9 NW2d 45 (1943). *Solakis v Roberts,* 395 Mich 13; 233 NW2d 1 (1995). In the case of *Solakis, supra,* 26, the Court reiterated the ruling in the case of *Allen, supra,* that an employee could have more than one employer and whether one or another or both were responsible for compensation as an *employer* was actually a question for the Agency or Magistrate to decide. The Court did not so much as imply that a circuit court had any such power. *Solakis, supra,* 26. There, the Court said,

> "In *Allen v Kendall Hardware Mill Supply Co,* 305 Mich 163; 9 NW2d 45 (1943), a dual employer situation, the Court held that the determination of which employer should be liable to pay benefits was a question of fact. While *Allen* utilized the old 'right to control test', this determination should also be a question of fact under the 'economic reality' test. Because only ELP paid plaintiff's wages, there is support in the record for the factual finding, and that finding is conclusive and binding on this Court."

The fact that there was one employee-employer relationship between Sewell and Bathey still required a determination of whether there was another, implied employee-employer relationship between Sewell and Armco through commercial relation between Armco and Bathey, a determination which *was* a *question arising under this act.*

Another circumstance that the Court reported but did not apprehend was the fact that "Armco had assumed control of the safety program and other operations' at Bathey." *Sewell, supra,* 58.

This circumstance that was described by Sewell and presumed to be a fact by the Court actually ended any question whether Armco was an *employer* because this meant that Armco was an *employer*. MCL 418.131(2). Section 131(2) states that, "As used in this section and section 827 . . . 'employer' includes the employer's insurer and a service agent to a self-insured employer insofar as they furnish, or fail to furnish, safety inspections or safety advisory services incident to providing worker's compensation insurance or . . . a self-insured employer's liability servicing contract."

The statement by Sewell about the operation of the safety program by Armco meant that section 131(2) applied and that Armco *was* an *employer* as a matter of fact and ending any question for either the Magistrate or circuit court.

Finally, the record which was before the Court was not concrete. While it was known that Sewell had received compensation, it was not known whether this payment was voluntary or by an order of a Magistrate. *Sewell, supra*, 66, 66, n 3. There, Justice Levin recounted that,

> "On May 10, 1976, Sewell injured his hand while working on a drill press machine during the course of his employment with Bathey Manufacturing Company. He commenced an action against Bathey, but the Court of Appeals affirmed the circuit court's conclusion that jurisdiction of that action was vested exclusively in the bureau. Sewell received workers' compensation benefits from Bathey.[3]
>
> * * *
>
> [3] It does not appear whether the benefits were paid voluntarily or following a determination by a referee or the Workers' Compensation Appeal Board."

The gap in the record was important. There would be no **question arising under this act** for the Agency *or* a trial court were there a prior adjudication by a magistrate because that decision would have been res judicata of whether Sewell was or was not an *employee* of Bathey or Armco. *Askew v Ann Arbor Pub Schs*, 431 Mich 714; 433 NW2d 800 (1988). There would have been a **question** about the subject matter jurisdiction for the

Court to decide in the case of *Sewell, supra, only if* the compensation had been voluntarily paid to Sewell because of MCL 418.831.

Rather than recognize this gap and resolve it before considering the issue about subject matter jurisdiction, the Court deliberately ignored it. The Court said nothing about the payment of compensation when recounting the facts in *Sewell, supra*, 58,

> "On May 10, 1976, while an employee of Bathey Manufacturing Company, the plaintiff was seriously injured in an industrial accident. In 1978, he filed a complaint in the Wayne Circuit Court, alleging that the accident had occurred as a result of the wrongful conduct of two defendants whose relationship to this case we need not consider here. An amended complaint added Armco Steel Corporation as a defendant. The plaintiff alleged that Armco had 'assumed control of the safety program and other operations' at Bathey, and that Armco 'operated some functions [of Bathey] and its manufacturing plant for profit at the direction and control of agents and employees of Armco'.
>
> Armco responded with a motion for accelerated judgment in which it stated that *it* was the plaintiff's employer and that the plaintiff's exclusive remedy against it was to seek workers' disability compensation benefits. MCL 418.131; MSA 17.237(131). Armco later filed an amended motion for accelerated judgment in which it stated that Bathey was its wholly owned subsidiary. In the amended motion, Armco recited that the plaintiff thought Bathey to be the employer while Armco thought itself to the be the employer." (emphasis by the Court)

It has been suggested that there is a predicate to **all questions arising under this act**. The predicate was suggested by a lawyer during the argument before the Court decided the case of *Reed v Yackell*, 473 Mich 520; 703 NW2d 58 (2005). The predicate was recapitulated in the case of *Reed, supra*, 539,

> ". . . plaintiff hurriedly pointed out at oral argument in this case, the relevant language ('all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate') may mean that, before deciding any 'questions arising under this act,' it is necessary to determine if the cause of action is in tort or worker's compensation. It is only after that is determined, *and* if it is determined that it is indeed a worker's compensation matter, that the bureau's jurisdiction is exclusive."

The predicate **it is necessary to determine if the cause of action is in tort or worker's compensation** was not derived from the text of the first sentence of section 841(1). It was not based on any ruling by any court. And the predicate was plainly contrived at the time for it fails to name the trial court or the Agency as the tribunal to **determine if the cause of action is in tort or worker's compensation.**

The problem of subject matter jurisdiction is a threshold problem about the power to decide. And that was the point that was made in *Aetna Life Ins Co, supra,* about *initial* jurisdiction.

There can be no predicate except that there is a **dispute** and a **question.** And there is *always* a **dispute** and there is *always* a **question** about the status of a person as an **employee** until that is decided by the Agency in a written opinion. Even a stipulation and voluntary payment of compensation does not preclude the existence of a **dispute** or **question arising under this act** for "Neither the payment of compensation or the accepting of same by the employee or his dependents shall be considered as a determination of the rights of the parties under this act." Section 831. Indeed, there is a **dispute** until the written order of the Agency is final as the Court of Appeals ruled in the case of *Couture v Gen Motors Corp,* 125 Mich App 174, 178; 335 NW2d 668 (1983),

> "In *Charpentier, supra,* this Court found that benefits are 'due and payable' and there is 'no ongoing dispute' only after the decision by either the referee or the board has been mailed and the time for appeal has run. In *Clark v General Motors Corp,* 117 Mich App 387; 323 NW2d 714 (1982), this Court found that a voluntary agreement was not due and payable and in dispute until formalized by the hearing referee. We agree with the results reached in those cases."

The problem with the predicate that was proposed in the case of *Reed, supra,* is that there is no accounting for who decides **if the cause of action is in tort or worker's compensation.** The case of *Reed, supra,* exemplifies why fidelity to text of the first sentence of section 841(1) can be the only measure for overruling the decision in the case of *Sewell, supra,* and not reliance or the consequences of the decision. It is reasonably clear that no

one actually thought that *Sewell, supra,* allowed subject matter jurisdiction. Counsel for Reed; counsel for Mr. Food, Incorporated, Buddy L. Hadley, and Seymour Herskovitz; the trial court; the Court of Appeals; and even the Court had simply assumed that the trial court had jurisdiction as the topic was broached after no fewer than two remands by the Court and *then* by an amicus curiae. And then, counsel did not respond. Counsel for Reed and counsel for Mr. Food, Hadley, and Herskovitz did not file a reply brief or present any argument to the Court about the validity or failure of *Sewell, supra, or Szydlowski, supra.* That is not reliance. That is only assumption. And that is ultimately only an uncritical acquiescence, which is no gauge of the accuracy of a ruling whether the acquiescence is by the Legislature or by counsel and trial courts.

The mistake by the lawyers in the case of *Reed, supra,* was the result of conflating immunity from a lawsuit with subject matter jurisdiction to decide the facts that could allow or deny immunity.

The first sentence of MCL 418.131(1) and the first sentence of MCL 418.827(1) provide an employer and co-employee with immunity from a lawsuit by an employee for a personal injury by stating that,

> "The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease."

and

> "Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies but the injured employee or his or her dependents or personal representative may also proceed to enforce the liability of the third party for damages in accordance with this section."

An immunity from a lawsuit does not allow the authority to decide that the conditions for it apply. The power to decide the conditions of immunity — the status of an

employee and the **personal injury** — is assigned to the Agency by the terms of the first sentence of section 841(1). That is, the Agency, and only the Agency, can decide whether a person is or is not an **employee** of another and, if so, whether a **personal injury** has occurred. There may be two consequences from such a decision. If an **employee** is injured, then compensation may be available by meeting the remaining requirements of the WDCA *and* the employer is immune from any lawsuits, which a trial court must recognize. If NOT an **employee** or NOT **injured**, then compensation is not available, and there is no immunity.

The lawyers in the case of *Reed, supra*, thought that a claim of immunity allowed the trial court to decide the presence of the conditions for it to apply with no appreciation for the text of the first sentence of section 841(1) and the vast and consistent body of law from the Court culminating in *Szydlowski, supra*, and *Aetna Life Ins Co, supra*, or even *Sewell, supra*. That cannot be said to be real "reliance" and underscores that "reliance" can never be part of deciding to overrule *Sewell, supra*.

The concerns with the purpose of a new rule/reliance/consequences or exigent circumstance must be assayed after overruling the decision in the case of *Sewell, supra*, for no exclusion applies. A case that has already been decided by a trial court, including *Sewell* itself, is not actually excluded by the rule of res judicata. Res judicata actually does not apply to exclude the cases that have already been decided by trial courts because the question of subject mater jurisdiction can be raised and decided at any time. It is not a defense that can be stipulated or forfeited by a party to a lawsuit. *Ward v Hunter Machine Co*, 263 Mich 445, 457; 248 NW 864 (1933). *Reed, supra*, 546-547 (CORRIGAN, J., dissenting).

The Court can, however, except cases already been decided by the terms of *Sewell, supra*. Trial courts have decided cases during the twenty years after *Sewell, supra*. While a count is not possible, the number of cases have been decided by trial courts during the twenty years after *Sewell, supra* is large. And many have been reviewed by the Court

of Appeals and even this Court and affirmed. Suffice it to say, the trial courts and those litigants should be able to rely on these judgments when *Sewell, supra*, gave colorable subject matter jurisdiction.

The consequences to the administration of justice would be substantial without an exception for the cases that have already been decided. Trial courts would have to retrieve and research cases that were decided during the twenty years after *Sewell, supra*; vacate the orders; notify the parties; and remand the case to the Agency for a hearing if there is no exception because a court is obligated to decide the question of subject matter jurisdiction. *Reed, supra*, 546-547 (CORRIGAN, J., dissenting). That would be daunting, if possible. *And* the Agency would have to convene hearings to decide the question about a person as an **employee** and having a **personal injury** many years, if not decades, after the fact on remand by a trial court without an exception.

Moreover, there is no real assurance that the Agency would change the result once reached by a trial court *if* the case were located, *if* the people were still alive, and *if* an evidentiary hearing could elicit reliable evidence. The Court should not ignore the real possibility that the Agency could reach the same decision as the trial court that an individual was or was not an **employee** or was or was not **injured** just to avoid disrupting the earlier disposition by the trial court.

None of these concerns apply to cases that have not already been decided. There can be no reliance on as flawed a decision as *Sewell, supra*. The future administration of justice is smooth and reliable as trial courts with no good experience with the WDCA can refer disputes to the tribunal that does, the Agency, and then grant or deny immunity with an authoritative decision that a litigant is an **employee** and has a **personal injury**. Accordingly the case at hand and any others that have not already been decided can be subject to the "new" rule which is really the "old" rule of *Szydlowski, supra*.

RELIEF

Wherefore, amicus curiae Workers' Compensation Law Section of the State Bar of Michigan prays that the Supreme Court vacate the opinion of the Court of Appeals in *Van Til v Environmental Resources Mgt, Inc*, unpublished opinion of the Court of Appeals, decided on February 10, 2005 (Docket no. 250539) and remand the case to the Workers' Compensation Agency for remission to the Board of Magistrates to convene a hearing and decide in a written order and opinion whether Marcia Van Til was an *employee* within the rubric of MCL 418.161(1)(l) and (n) which may be appealed to the Workers' Compensation Appellate Commission, the Court of Appeals and Supreme Court by the terms of MCL 418.859a(1) and MCL 418.861a(14) before deciding whether to affirm or vacate the judgment of the Circuit Court for the Twentieth Judicial Circuit of the State of Michigan.

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